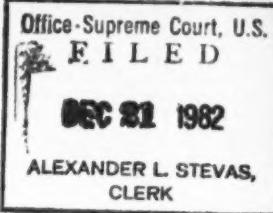


82 - 1063



U. S. SUPREME COURT CASE NO. _____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1982 TERM
DONALD COOK,
APPELLANT-PETITIONER,
VS.
THE SUPREME COURT OF THE STATE OF ALABAMA,
APPELLEE-RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF ALABAMA

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CERTIFICATE OF SERVICE.

I, William H. Manasco, Attorney for the Petitioner, a licensed member of the Bar of the U. S. Supreme Court, do hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari on:

The Clerk of the Alabama Supreme Court
P.O. Box 157
Montgomery, Alabama 36102

The Attorney General of Alabama
250 Administrative Building
Montgomery, Alabama 36101

pursuant to Rule 28.2 of the Rules of the U.S. Supreme Court, by placing a copy of the same in the U.S. Mail certified with postage prepaid.


William H. Manasco
Attorney for the Petitioner
Route 2 Box 263
Carbon Hill, Alabama 35549
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QUESTIONS PRESENTED FOR REVIEW.

1

I.

Is the Supreme Court of the State of Alabama in violation of the due process clause of the 14th Amendment to the United States Constitution when it refuses to address an appellate issue raised by an appellant in a criminal appeal?

II.

Is the Supreme Court of the State of Alabama and the Alabama Court of Criminal Appeals in violation of the due process clause of the 14th Amendment to the Constitution of the United States, when it refuses to address an appellate issue upon consideration of appeal when it is under a mandatory statutory obligation imposed by the Alabama Legislature to address such issue?

STATEMENT OF THE GROUNDS FOR JURISDICTION.

The appellant applies for this Writ upon a judgment entered by the Alabama Court of Criminal Appeals on June 29, 1982, upon which a timely Application for Rehearing was denied on July 27, 1982. The Writ of Certiorari to the Alabama Supreme Court was denied on October 22, 1982.

The appellant claims that the appellate jurisdiction of this Court may be invoked under Rule 17.1c of the Rules of the Supreme Court of the United States, cited as follows;

"A review on writ of certiorari... will be considered..."

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The appellant propounds the following statutory provisions are involved in the determination of his cause;

Amendment XIV, Section 1, of the Constitution
of the U. S.;

"All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The 1975 Code of Alabama, Title 12-22-240;

"In all criminal cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgement as the law demands.

STATEMENT OF THE CASE.

Donald Cook, the appellant, on October 21, 1980, was indicted by a Walker County, Alabama, Grand Jury for the offense of Assault in the First Degree. On November 17, 1980, the appellant was present in open court with his retained trial attorney, the Honorable Rusty McDonald of Birmingham, Alabama. At this time he was arraigned and entered a Plea of Not Guilty to the offense embraced in the indictment.

The case was set for trial on January 13, 1981. A jury was impaneled. The appellant failed to appear and a mistrial was declared. A warrant of arrest for contempt was entered on January 13, 1981, and executed on March 23, 1981. The appellant was tried by jury on May 12, 1981, and found Guilty of Assault in the Third Degree. On May 20, 1981, the appellant was sentenced to twelve months hard labor at which time he applied for probation. The appellant filed a timely notice of appeal on June 30, 1981. On August 19, 1981, the appellant was denied probation. Upon timely filing of briefs, the cause was heard orally by the Alabama Court of Criminal Appeals on March 2, 1982.

The Court of Criminal Appeals handed down a decision affirming the Circuit Court's ruling on June 29, 1982. The appellant filed timely Application for Rehearing on July 12, 1982, which was denied on July 27, 1982. The appellant filed a Petition for Writ of Certiorari with the Alabama Supreme Court on August 9, 1982. The Petition was denied on October 22, 1982, with the Supreme Court issuing no opinion.

The federal questions involved in this petition were first encountered and therefore raised before the Alabama Court of Criminal Appeals. The appellant first addressed the issue of "due process" as a result of the Court's initial decision and determination in his Application for Rehearing which was filed the Court on July 12, 1982. The issue was further addressed to the Alabama Supreme Court in the appellant's Petition for Certiorari which was filed on August 9, 1982. This was also summarily denied on October 22, 1982, without opinion.

ARGUMENT

ISSUE I.

This cause came to the Supreme Court of the State of Alabama upon a Petition for Writ of Certiorari from the Alabama Court of Criminal Appeals. The appellant in his initial brief to the Court of Criminal Appeals had raised the issue as one of his trial court's errors, as to whether the court had erred when it charged the jury that one of his defense

witnesses had been impeached (See appendix pages A12-A17).

The Court of Criminal Appeals issued a decision refusing to address the issue on the grounds that no objection or exception had been taken to the charge by the appellant at the trial court level, therefore, nothing was preserved for review on the issue (see appendix pages A7-A8).

The appellant had submitted in his initial brief and subsequent pleadings that this was contrary to Alabama law. The Court of Criminal Appeals cited cases upholding its decision which pertained to the refusal of requested charges on the part of the trial court (see appendix page A8). The instant issue addresses spontaneous declarations on the part of the trial court without prior initiation or request on the part of the appellant.

The appellant timely in his Application for Rehearing raised the issue of due process to the Court of Criminal Appeals both by argument in his supporting brief and by injection of the

instant issue (see appendix pages A12-A17).

These efforts were to no avail in the Court of Criminal Appeals with the Application being summarily denied without opinion.

The issue of improper jury charge was at this time raised in the Supreme Court of the State of Alabama by Petition for Writ of Certiorari (See appendix pages A18-A23). The issue of improper jury charge plus the constitutional issue of denial of due process were again raised to no avail. The Supreme Court denied summarily the Petition with no opinion (see appendix pages A10-A11).

It is the contention of the appellant that the failure of the Alabama Supreme Court to review the federal questions involved in this cause are a denial of his right to due process under the 14th Amendment to the Constitution of the U. S.

The general scope of "due process is to guarantee that every citizen shall be insured proceedings before a tribunal that are accompanied by timely and sufficient notice followed by a fair and adequate hearing. This definitional

scheme is followed not only at the trial court level; but, at the appellate court level as well. It has been held by the U. S. Supreme Court in Frank v. Mangum, 237 US 309, 59 Led 969, 35 SCt 582, as follows;

"The inquiry on application to the Federal Courts for a writ of habeas corpus in behalf of a person held in custody under a conviction of crime in a state court, should not be confined to the proceedings and judgement in the state trial court, where an appeal is provided for by the state laws and the prisoner has had the benefit of it, but the proceeding in the state tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and are to be considered in determining any question of alleged deprivation of his life or liberty without due process of law, contrary to the 14th Amendment to the Federal Constitution."

The appellant contends that by the Supreme Court of Alabama's refusal to address and render a decision upon the trial court's improper jury charge that this is a denial of his rights to due process.

Due process not only includes the right to be heard on an issue but further contemplates that the issues presented will be properly addressed and decided upon whether it will be in the affirmative or the negative. If this were

not the case then any tribunal when it so desired to refrain from ruling on a controversial issue, would merely hear the issue and then refrain from ruling thereon. It is the contention of the petitioner that this is not the constitutional intention or definition of due process intended the Constitution, the common law, or a majority of the courts of our land. The U. S. Supreme Court has held in Fay v. Noia, 372 US 391, 9 Led 2d 837, 83 S Ct 822, as follows;

"Due process denied in state court proceedings leading to conviction is not restored just because the state court declines to adjudicate on the merits the claim of denial of due process."

It is the contention of the petitioner that he is being denied his guaranteed right to due process by the State of Alabama. It is his further contention that the present state of affairs will remain in this condition unless acted on by this Honorable Court.

The second issue of due process propounded by the petitioner is that the Alabama appellate courts are denying him due process of the law as guaranteed by the 14th Amendment of the Constitution by failing or refusing to address his appellate issue of improper jury charge when required to do so under a state statute designed for the explicit purpose of insuring due process.

The Alabama statute in point is Title 12-22-240 of the 1975 Code of Alabama (see appendix page A24-A27), which states as follows;

" In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgement as the law demands."

The wording of this statute places the mandatory requirement on the Alabama Court of Criminal Appeals to review any case question which is brought to it, which is apparent on the record. It has been said that this statute requires the Court to search the record.

The instant question involved in this proceeding, the refusal of an issue to be addressed because the trial attorney for the petitioner

had failed to except to the improper charge, this constituting the basis for the Court of Criminal Appeals refusal to address the issue (see appendix page A7-A8). The United States Supreme Court has stated along these lines in Fay v. Noia (cited above) as follows;

"While a defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds, a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured."

The Alabama statute has defined those errors which are reserved as those which are preserved at the time of trial by exception for the record. The Court of Criminal Appeals in the past has extended this statute to include errors which were not reserved but were apparent on the record (See comments to statute on appendix pages A24-A27).

The purported error in this cause was not preserved by exception, but it was apparent on the record and has been presented to both lower appellate courts in briefs and pleadings (See appendix pages A12-A23). The Court of Criminal

Appeals raised the issue and the petitioner responded in his Application for Rehearing and brought to issue the foregoing statute.

The appellate courts of Alabama are establishing two categories of due process through their interpretation and application of appellate review. These are those cases where error is committed and is reviewed because it was excepted to, and those cases where error is committed and the courts in their discretion review though not excepted or reserved.

It is the contention of the petitioner that categorical due process which has been denied in his cause is not due process within the contemplation of the 14th Amendment. The petitioner would cite *Fay v. Noia*, (cited above);

"The scope of due process of law comprehends not only an accused's right to be heard but also a number of explicit procedural rights drawn from the Bill of Rights."

The petitioner contends that the consideration of his erroneous jury charge is mandatory both under the Alabama procedural statute and the 14th Amendment to the U. S. Constitution.

The petitioner contends that the courts of Alabama are bound by due process under the 5th and 14th Amendments to the U.S. Constitution in the same manner as the federal judiciary. This can be exemplified in the U. S. Supreme Court's holding in *Fletcher v. Peck*, 6 Cranch 87, and also from Article IV Section 2 of the U. S. Constitution which states that," the judges in every state shall be bound by the federal constitution ... any thing in the Constitution or the laws of any state to the contrary notwithstanding."

The petitioner contends that the Court has the power to enjoin and vitiate this action against him under *Ex Parte Young*, 209 US 123. The petitioner is aware that this Court will not interpret cases of this nature which are and have been decided upon independent state grounds. This cause has remaining before the appellate courts of Alabama one remaining undecided issue which may vindicate his cause. The appellate courts have indicated that they are refusing to address the issue because of

a procedural default on the part of the petitioner. The petitioner would cite to this Court the case of Staub v. City of Baxley, 355 US 313, in which the Court held that the state court's reason for refusing to pass on the question was "overly technical and thus not an adequate ground to preclude review." A similar situation may be exemplified in NAACP v. Alabama, 357 US 449. The petitioner contends that his plight is in its nature the same as the foregoing cases.